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IN THE

Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *ET AL.*,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST [1] OF *AMICUS CURIAE*

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because this Court's decision on when the government may and may not regulate the content of citizens' viewpoints is crucial to preserving the protections afforded by the First Amendment to our Constitution. The unavoidable corollary to expanding the scope of "government speech" is limiting the scope of private speech and regulating individuals' viewpoints. The Rutherford Institute urges this Court to affirm the decision below.

SUMMARY OF ARGUMENT

The First Amendment protects a speaker's right to speak. In this case, the Court of Appeals was faced with the question of who the speaker was. It sought to answer that question by asking who a reasonable observer would believe the speaker to be. The Court of Appeals answered that question correctly, but using a reasonable observer standard is subjective and, thus, unreliable; this much is obvious from the straight-

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[1] This amicus brief is filed with the parties' consent. Petitioners filed their consent on December 12, 2014, and Respondents filed their consent on January 7, 2015. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

forward question: does the license plate in question honor soldiers or ancestors or antebellum prejudice?

This Court generally has avoided expressing its views on the content of speech in the context of its First Amendment analysis, instead allowing the marketplace of ideas to weigh the various views. Sitting in traffic, observing diverse license plates on the vehicles all around, is no different. Consistent with that principle, The Rutherford Institute asks the Court to consider instead whether the government has invited the private speech and, if it has, what groups or categories of speech the government invited to contribute to the marketplace of ideas. By borrowing this principle from the limited public forum context, this Court can establish clear guidance for distinguishing between government and private speech, and, in the process, explain to States how they can retain control of their messaging if that is what they wish to do. Reasonable observers may disagree whether a specialty license plate is private speech, but Texas's invitation to "any nonprofit entity" to sponsor specialty plates invites all nonprofit comers and requires viewpoint neutrality.

ARGUMENT

I. The Test Applied by the Court of Appeals for the Fifth Circuit—and Variations Applied by Other Courts of Appeals—Does Not Capture the Entire Government Speech Analysis.

In defining "government speech," the Court of Appeals for the Fifth Circuit drew upon two opinions from this Court, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Johanns v. Livestock Marketing*

Ass'n, 544 U.S. 550 (2005). *See Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 393 (5th Cir. 2014). The Court of Appeals for the Fifth Circuit is not alone in that regard. *See, e.g.*, *Newton v. Lepage*, 700 F.3d 595, 602 (1st Cir. 2012) (evaluating a mural in the reception area of a government agency); *Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011) (asking whether a dancer must be permitted to perform in the Jefferson Memorial). This makes a certain amount of sense, because, as the Court of Appeals remarked, and as Justice Stevens observed in his concurrence in *Summum*, 555 U.S. at 481, the government speech doctrine is "recently minted."

The Court of Appeals here reached the correct result, but The Rutherford Institute writes to suggest that the test it applied in the process (1) improperly ignores a third line of United States Supreme Court cases that provides a much more precise and apt basis for ascertaining whether speech is public or private; and (2) is not in accord with this Court's precedent and is likely to lead to inconsistent results. In Section II, *infra*, The Rutherford Institute proposes an alternative test that it borrows from this Court's precedent on the "limited public forum," which accommodates the concerns raised by Petitioners and their *amici*. Under this alternative, the decision of the Court of Appeals below remains correct and should be affirmed.

A. The Two Cases Relied on by the Court of Appeals Represent Only Two of the Three Lines of Cases on Government Speech.

Summum is one of a line of cases that has assessed the intersection of Establishment Clause jurisprudence and speech with regard to the use of

government land. *Johanns*, in contrast, is from a line of cases that has evaluated (or recognized that the question was not ripe for addressing) the extent to which the government may require private persons to underwrite the cost of a government message. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in judgment) ("Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context."); *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990) ("A governmental agency may use unrestricted revenue, whether derived from taxes, due[s], fees, tolls, tuition, donations, or other sources, for any purposes within its authority." (citation omitted)); *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 482 & n.2 (1997) (Souter, J., dissenting) (acknowledging private persons have right to be free from subsidizing compelled speech by private and quasi-private organizations, and noting that the Secretary of Agriculture was not arguing that the speech at issue was government speech).[2]

But, beginning at least as early as *Board of Education v. Grumet*, 512 U.S. 687, 720 (1994),

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[2] *Wooley v. Maynard*, 430 U.S. 705 (1977), is along this line, although the specific question in that case was whether a speaker could refuse to communicate a government-adopted message, rather than to underwrite it.

another layer of cases arose—sometimes with Establishment Clause implications and sometimes not—in which the Court assessed the inverse of the question presented in the *Abood* line of cases: if the government is establishing an opportunity for private speech, what are the parameters of its control? Thus, in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Court found that the fact that the universities in question permitted and encouraged individual students to choose and participate in student activities required viewpoint neutrality. In *Southworth*, the Court drew an explicit line between facilitation of student expression and the speech of the university:

> Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

529 U.S. at 235. The Court also explained why having students vote for which expressive activities would receive student benefits was "constitutionally problematic": "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Id.*

The Court distinguished *Southworth* in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302-03 (2000), finding that the school district was the speaker for purposes of the Establishment Clause, because the school district allowed only a single student to give an invocation, "subject to particular regulations that confine the content and topic of the student's message." *Id.* The *Doe* Court agreed with the *Southworth* Court, however, that an election could not protect minority views. *Id.* at 304-05. Nonetheless, Chief Justice Rehnquist, in dissent, suggested that it would likely have been constitutional for the students to choose a speaker "according to wholly secular criteria—like good public speaking skills or social popularity—and the student speaker may have chosen, on her own accord, to deliver a religious message." *Id.* at 324 (Rehnquist, C.J., dissenting); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (observing that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker" or "used private speakers to transmit information pertaining to its own program" and that the Legal Services Corporation program in question "was designed to facilitate private speech, not to promote a governmental message" (citation omitted)); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. ___, 133 S. Ct. 2321, 2328 (2013) ("In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.").

This Court has drawn from all three lines of cases in evaluating whether there is government speech at

issue. But, as discussed at greater length in Section I.B, *infra*, by failing to incorporate the principles set forth in the *Rosenberger* line of cases in the government speech analysis, the Court of Appeals here has—and other Courts of Appeals have—crafted a test that will not adequately guide the lower courts as they seek to differentiate government from private speech.[3]

To be sure, the Court of Appeals for the Fifth Circuit acknowledged *Rosenberger*, but only in the context of the second question the Court of Appeals faced—whether Texas's conduct was viewpoint discrimination. The Rutherford Institute writes to suggest that the *Rosenberger* line of cases also provides assistance to the question the Court of Appeals addressed first—whether the speech at issue is government speech or private speech.

B. The Reasonable Observer Test Is Inapt for Ascertaining Government Speech.

Although The Rutherford Institute writes in support of Respondents, it agrees with Petitioners that defining government speech by what a "reasonable observer" would perceive is "indeterminate" and can lead "different jurists to reach diametrically opposing

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[3] The Court of Appeals for the Fourth Circuit has developed its own test, where it asks whether speech was governmental based on: (1) "the central purpose of the program in which the speech in question occurs"; (2) "the degree of editorial control exercised by the government or private entities over the content of the speech"; (3) "the identity of the literal speaker"; and (4) "whether the government or the private entity bears the ultimate responsibility for the content of the speech." *See ACLU v. Tata*, 742 F.3d 563, 569 (4th Cir. 2014), *petition for cert. filed sub. nom.*, *Bergen v. ACLU of N.C.*, No. 14-35 (July 11, 2014) (quotation marks and citation omitted).

conclusions." Pet'rs Br. at 29. For different reasons than those articulated by Petitioners, The Rutherford Institute also agrees that a subjective reasonable observer test is in tension with the principles underlying the government-private speech analysis. Considering the Court's precedents more broadly, however, it appears that this Court has actually used perception as a proxy for the structural assurances that a government is facilitating private speech. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765-66 (1995) (plurality opinion) (crediting those familiar with community practices with the ability to recognize an open forum and private sponsorship of an activity).

In Texas, by statute, a sponsor (including "any nonprofit entity") of a specialty license plate can contract with a specified private vendor for the plate's manufacture and distribution, Tex. Transp. Code § 504.801(a), (b); may nominate a state agency to receive funds from the sale of the plates and "identify uses to which those funds should be appropriated," *id.* § 504.801(b); and individuals may personalize specialty license plates for an additional fee, *id.* § 504.102. Moreover, the Texas Transportation Code distinguishes between specialty license plates that serve specific functions—addressed in Subchapters C-F (for those with disabilities, in the military, or others with restricted distribution or regular license plates) and Subchapter G, which covers the specialty license plates for general distribution that are the provisions at issue here. Numerous aspects of individual choice have been built into Texas's specialty license plate scheme.[4] And, as a result, a person purchasing a

[4] Of course, just as with *Wooley*, the state could choose to speak by creating a uniform license plate that requires persons to "use

license plate knows that he or she can choose a plate based on personal preferences. Vehicle owners, as individuals, thus choose what to say as a community. *Cf. Capitol Square Review & Advisory Bd.*, 515 U.S. at 765-66 (plurality opinion) (noting community members are able to recognize private sponsorship of an activity in an open forum).

In contrast, in cases such as *Johanns*, 544 U.S. at 554, the government has deliberately set out to articulate a message that it has conceived; there is no question whose voice is being heard in that circumstance either. The public display cases take a step back from that, however, because, as this Court recognized in *Summum*, when the government owns property and deliberately places something on that land, it has "engaged in expressive conduct" without regard to what the message is or to whether it "formally embrace[s]" the message. 555 U.S. at 474. This creates a danger that counsels particular caution in ascribing speech to the government—and in giving the government the concomitant power to control that speech. When a government seeks to measure its conduct by a hypothetical reasonable observer, it will necessarily bring its own perspective to bear—something that Petitioners tacitly embrace by insisting that Texas should not be required to be

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their private property as a 'mobile billboard' for the State's ideological message" and "to be an instrument for fostering public adherence to an ideological point of view." 430 U.S. at 715. But that is not this case. *Cf. Cressman v. Thompson*, 719 F.3d 1139, 1157 (10th Cir. 2013) (reversing dismissal because plaintiff alleged sufficient facts to "suggest that the 'Sacred Rain Arrow' image on the standard Oklahoma license plate conveys a particularized message that others are likely to understand and to which he objects").

associated with what it perceives to be a pro-Confederacy stance.

But, as this Court explained, a monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id.* Indeed, text-based monuments "are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable." *Id.* at 475-76.

This case is illustrative of that ambiguity, because Petitioners have focused solely on the fact that some persons will be offended by references to the Confederacy; others may focus on the fact that a person is remembering a veteran, and those persons may recognize that every war engenders bitter responses by some and pride by others. For this reason alone, it is remarkable that Petitioners are self-righteous in their indignation toward Respondents when Texas has, in its own words, placed its "name and prestige behind" a plate honoring Buffalo Soldiers. Pet'rs Br. at 31. Apparently the State of Texas is willing to "associate with or endorse [and] propagate" a message that embraces a historical occurrence as demonstrating current prejudice—but only when the State is not offended.[5] *Id.* at 31-32.

This case has far less of a tie between the government and a message than the monuments at issue in *Summum*, because a license plate is typically

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[5] At the same hearing in which Respondents' proposed plate was rejected, the Texas Department of Motor Vehicles Board approved a plate honoring Buffalo Soldiers, despite a report that a group of Native Americans found the Buffalo Soldiers plate offensive. *See* Resp'ts Opp'n to Pet. for Writ of Cert. at 4.

viewed fleetingly (if a person looks beyond the make and model of a private automobile to the plate at all), while a monument may well be positioned by the government in an environment that invites a viewer to sit near it or to walk around or through it and to read any text on it and contemplate it. The only connection between the government and a personalized specialty plate is the fact that the State mandates *some* license plate for identification purposes.

When the government seeks to take upon itself to regulate what speech private persons engage in through government channels, the government takes on the role of the "voters" that were condemned in *Southworth*, controlling what message will be heard based upon how it construes the message. That offends the First Amendment, because the essence of the principle forbidding viewpoint discrimination is that minority views deserve precisely the same protection as majority views. *See Southworth*, 529 U.S. at 235.

Although not articulated in the same way, the Court of Appeals for the Second Circuit recognized the weakness of a subjective test in *Byrne v. Rutledge*, 623 F.3d 46, 60-61 (2d Cir. 2010):

> The infirmities in Vermont's application of its own statute are amply demonstrated by the case at bar. Byrne applied for the plate JN36TN, which the state refused to issue because Byrne's supplied meaning indicated his intent to refer to the Biblical passage John 3:16. However, as Byrne argues, and the record supports, Vermont would have approved that very same combination had Byrne supplied a secular meaning for it – e.g., "[M]y name is John, I am 36, [and] I was born

> in Tennessee." Of course, no one other than Byrne himself and the DMV clerk processing his application would know the difference – to all outside observers, the issued plate would appear the same irrespective of Byrne's supplied meaning – and yet the state would have us approve as "reasonable" its attempt to distinguish between the two applications for the same plate. This we decline to do. The state offers no legitimate government interest furthered in drawing such a distinction, nor can we discern any.

Id.

In any event, the reasonable observer analysis is often superfluous. In *Newton*, 700 F.3d at 602, for example, the government wanted to move a mural that "some" perceived as pro-labor, and the appellants argued that the proper test was "whether a person in the waiting room could have reasonably understood the mural's views to be those expressions of the artist and not of the government." The Court of Appeals refused to decide whether the speech was the artist's or the government's, finding greater significance in the prominence and location of the mural, and granting the government authority to "disassociate itself from an endorsement implicit from the setting for the mural." *Id.* Rather than apply a reasonable observer test, the case could have been decided merely based on the fact that "the government must have some discretion as to the choice of art it puts on the walls of its offices." *Id.* at 603.

Whether considered unnecessary, inapt, or unduly subjective, there exists a better alternative to the "reasonable observer" test applied here by the Court of Appeals for the Fifth Circuit.

II. The Demarcation Between Government Speech and Private Speech Should Be the Medium of Speech and the Government's Invitation to Speak.

This Court's jurisprudence provides an alternative means to clarify the standard for distinguishing between government speech and private speech, readily available in the First Amendment context. Decisions regarding the "limited public forum" offer an apt analogy for distinguishing between government and private speech and, on more than one occasion, this Court has looked to these principles as instructive for other purposes in First Amendment analysis. *See, e.g.*, *Velazquez*, 531 U.S. at 544; *Southworth*, 529 U.S. at 229-30. The Court should draw on those principles in this case to elucidate the distinction between government speech and private speech.

A limited public forum is a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (citing *Summum*, 555 U.S. at 470). A "forum" is not an entirely apt image, because a channel or medium of communication may constitute the relevant forum for this analysis, and the forum is defined with reference to the access sought by the speaker. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). A more tailored analysis of the relevant forum may be appropriate to identify the forum to which speakers seek access on public property. *See id.* In *Cornelius*, the speakers sought access to the Combined Federal Campaign, a means by which entities could seek charitable contributions from federal employees. The speakers were not seeking

access to the federal government's physical property (i.e., the workplaces), but instead were seeking "access to a particular means of communication." *Id.*

In a limited public forum, the State may restrict speech, but it may not discriminate on the basis of viewpoint and the restriction must be reasonable in light of the purpose served by the forum. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).[6] Moreover, once "limited" access is granted to the "forum," the constitutional right of access extends to other entities of similar character. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983). The objective of this standard is not to narrowly define the category or group that has been permitted; once the forum is opened to a category or group, the government may not prohibit a particular viewpoint of similar groups or within that category. *See, e.g., Rosenberger*, 515 U.S. at 824-25 (holding unconstitutional a restriction on reimbursement of costs to student news organization because its publications expressed a religious viewpoint); *Lamb's Chapel*,

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[6] There is some suggestion that Texas did not create a limited public forum in this case because it did not *intend* to do so, citing *Cornelius*, 473 U.S. 788. *See* Amicus Br. of Ohio et al. at 20-24. *Cornelius* certainly discusses an intent requirement, but based on subsequent decisions, including *Rosenberger*, *Summum*, and *Christian Legal Society*, among others, it appears the "intent" requirement of *Cornelius* applies to a "designated public forum," rather than a "limited public forum," as those terms are used in more recent decisions of this Court. The scope of permissible regulation for the "nonpublic forum" in *Cornelius* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and for the "limited public forum" in more recent decisions of this Court confirm the interchanged labels. *See also Byrne*, 623 F.3d at 54 n.8. Accordingly, Respondents need not show that Texas intended to create a limited public forum in specialty license plates.

508 U.S. at 387, 394 (concluding that state law permitting "social, civic, or recreational uses" of public schools could not prohibit religious viewpoints on those topics).

For this reason, the Court of Appeals for the Seventh Circuit, in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 855 (7th Cir. 2008), may have taken too granular a view of the permissible exclusion. Illinois permitted anyone to sponsor a specialty license plate if they obtained a sufficient number of applicants. The broad scope of the invitation prohibited Illinois from discriminating against the viewpoints of the invited individuals. But in considering the message rather than the scope of the invitation, that is precisely what the flawed analysis of the Court of Appeals for the Seventh Circuit permitted. The Court of Appeals for the Second Circuit, by comparison, properly recognized that the scope of the invitation controls. *See Byrne*, 623 F.3d at 55.[7] By inviting all to adopt a vanity plate, Vermont could not reject a particular viewpoint—i.e., religious.[8]

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[7] Under Petitioners' application of the reasoning of the Court of Appeals for the Seventh Circuit, no court could find—as the Court of Appeals for the Second Circuit did—that the government was doing anything except controlling access to the forum when it excludes plates. Indeed, Petitioners' brief cites *Choose Life Illinois* in arguing that it should be entitled to reject Respondents' proposed specialty plate because "[t]he State has not issued any specialty license plate that disparages the confederate battle flag or the views espoused by the Sons of Confederate Veterans." Pet'rs Br. at 46.

[8] This is not to say that Vermont could not exercise any control over the content of the vanity license plates. Its statute expressly delineated certain characteristics of plates that were categorically excluded. But those circumstances are objective, narrowly defined, and carefully maintained. None would apply

The discord in the analysis among the Courts of Appeals is troubling. The Courts of Appeals for the Fourth, Sixth, and Seventh Circuits reached different results and for different reasons on nearly identical specialty license plates. Although the Fourth and Seventh Circuits agreed that the speech was private, they disagreed on the permissible regulation; the Sixth Circuit, however, did not even agree that private speech rights were implicated. *Compare Tata*, 742 F.3d at 574 (concluding North Carolina legislative enactment could not choose one side of abortion debate because specialty license plates implicate private speech rights), *with White*, 547 F.3d at 865-66 (concluding that Illinois legislature could exclude entire subject of abortion because the exclusion was content-based but viewpoint neutral, as permitted in a nonpublic, or limited public, forum), *and ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379-80 (6th Cir. 2006) (concluding Tennessee could legislatively limit specialty license plates to one side of debate because the "Choose Life" message was government speech). These inconsistent results—as to whether and even when there is agreement on who is the speaker—underscore that the approaches currently used in the Courts of Appeals are inadequate to provide clear guidance to distinguish between government speech and private speech.

Applying the limited public forum principles by analogy, the State's invitation for private participation in an area of traditional government speech provides a clear means to distinguish between government and private speech. An invitation extended to certain categories or groups requires the government to

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here. And, certainly, the potential to offend is not one of those circumstances.

permit all private viewpoints even in an area traditionally considered government speech, subject to reasonable restrictions.

Here, Respondents seek access to a medium of communication, which Texas has opened to certain groups. In particular, Texas has invited *any* non-profit entity to submit a proposal for a specialty license plate. Tex. Transp. Code § 504.801(b).[9] Texas goes on to say that it will "design each new specialty license plate in consultation with the sponsor" and that it "may refuse to create a new specialty license plate if the design might be offensive to any member of the public, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule." *Id.* § 504.801(c).

Petitioners insist that the latter provision transforms Texas into the speaker and enables it to control whether individual sponsors may use specialty license plates to convey messages. But section 504.801(c) is not the State *speaking*; it is the State reserving to itself the discretion to determine whether "any member" of the public "might be" offended, and then the additional discretion whether to refuse to produce the plate—or not—even if it thinks any member (or many members) may be offended. That allowed the State to approve the Buffalo Soldiers plate and disapprove Respondents' plate.

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[9] Texas has also invited for-profit entities and individuals to design specialty license plates through a third-party vendor. *See* Tex. Transp. Code § 504.6011(a). The Rutherford Institute focuses on nonprofit entities because Respondents fall within that group.

It is thus the power of discrimination that Texas calls "government speech." But, as the Court of Appeals for the Ninth Circuit succinctly stated: "The government speech doctrine is a jurisprudential theory by which the federal government can regulate its own communication 'without the constraint of viewpoint neutrality.'" *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877 (9th Cir. 2014), *petition for cert. filed*, No. 14-857 (Jan. 16, 2015) (citation omitted). If, as in *Johanns*, the government has a message that it intends to communicate, its freedom to define the parameters of that content makes sense. And if, as in *Summum*, the issue is not what the government intends to say but that it is being permanently said on a finite amount of government property, it likewise makes sense that the government be permitted to choose the content of that speech.

But here, Texas invoked the standard, "might be offensive to any member," as the basis for refusing Respondents' proposed plate. That basis permitted Texas to do precisely what is prohibited in a limited public forum—Texas discriminated against a viewpoint of a nonprofit entity it had invited to create a specialty license plate. The statute's subjective standard engenders this discrimination because it is, by its terms, *not* viewpoint neutral. Rather, it allows the State to reject a proposal *because of* its viewpoint and the potential to offend. *Cf. Capitol Square Review & Advisory Bd.*, 515 U.S. at 765-66 (plurality opinion) (recognizing that it is not realistic to worry that others may perceive that government endorsement "followed directly from the fact that the forum was open and the religious activity privately sponsored," noting that erroneous conclusions do not count). Said another way, Texas has reserved for itself the right to prohibit a perspective. That is stifling private speech, not

exercising the prerogative of a government speaker. *See Rosenberger*, 515 U.S. at 831 ("By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.").

By opening specialty license plates to private speech through proposals, Texas has invited private speech into a medium that Texas had previously reserved to itself. Texas may not call the resultant speech its own so that it may engage in viewpoint discrimination against Respondents. Such a holding in no way undermines the government's regulatory interest in using license plates as a means for identifying vehicles and confirming proper registration. The government retains that interest even on a private speech plate.

Indeed, under the limited public forum analysis, States also retain the right to select messages of their own and endorse viewpoints—so long as the States exercise the right exclusive of private speech. *Compare* Pet'rs Br. at 41-46 (elaborating on risk of "untenable consequences"); *see generally* Amicus Br. of Ohio et al. (raising concerns regarding implications of decision below for State specialty license plate programs); Amicus Br. of Phil Berger and Tim Moore (arguing legislatively-controlled specialty license plates are government speech). This analysis also

avoids the concern raised in *Summum* of closing the forum to speech altogether. States will be able to include the same messages they have before, so long as it is the State actually engaging in the speech, whether through the legislative or executive branch. *Cf. Rosenberger*, 515 U.S. at 834 ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles").

Once the States invite private parties to apply to include their messages on State-issued license plates on private vehicles, though, the States have yielded the platform to other, quintessentially private messages. The channel of communication then becomes analogous to a limited public forum and the State must permit all viewpoints within the permitted category.[10] Said another way, Texas permits private vehicle owners to purchase a "Fight Terrorism" specialty license plate; vehicle owners can then choose to espouse that view. By permitting a "Fight Terrorism" plate, Texas cannot decide that that viewpoint on that issue is the only viewpoint Texas will offer for sale to the public. Texas has invited any

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[10] Considering the medium of the messaging also distinguishes Texas's reliance on *Texas ex rel. Texas Transportation Commission v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995). In that case, Texas excluded the KKK from the State's Adopt-a-Highway program because it did not want to be associated with the KKK's beliefs. The Adopt-a-Highway program, however, is associated with State highways and signage for the State program along the highway. Texas had not ceded control over the signage as it has to nonprofit entities for specialty license plates. The same is true for the monument in the public park at issue in *Summum*. The medium of the speech was a *public* park over which the city retained control.

nonprofit entity to share the platform, and it cannot discriminate among the views of nonprofit entities. Nonetheless, Texas is always free to return to the "plain-vanilla license plate," or to reserve to itself the right to create specialty plates, which would be government speech subject only to *Wooley*. It could also invite universities, or could invite only those who wish to sponsor plates bearing Texas monuments.

Under this alternative framework, the result reached by the Court of Appeals for the Fifth Circuit in this case is correct. By allowing "any nonprofit entity" to propose specialty license plates, Texas ceded a level of discretion to those entities over the content of that portion of the license plate. As a result, the government surrendered the right to treat the license plate, as a whole, as a channel for speech subject to censorship. Texas's effort to retain some control of that messaging violated Respondents'—and others'—First Amendment right to free speech.

CONCLUSION

By statute, Texas encouraged any nonprofit group to express itself through specialty license plates, but it gave itself the privilege of controlling the messages conveyed, and it called the result "government speech." The Court of Appeals properly recognized that it was not government speech at all, but the test that the Court of Appeals employed is not reliably consistent. Existing Court precedent, however, provides an apt analogy for this case in the context of limited public fora. By applying this framework, the difference between government and public speech becomes evident from the State's invitation to the public to speak. Once Texas invited any nonprofit to sponsor specialty license plates, Texas forfeited the right to exclude messaging from similar entities.

Texas can no longer pick and choose the messages that may be conveyed on specialty license plates.

The decision of the Court of Appeals for the Fifth Circuit should be affirmed, not because a "reasonable observer" would conclude specialty license plates constitute private speech, but because the medium is not exclusively public and Texas has permitted private parties to speak through that medium. By employing principles of limited public fora, the Court can provide guidance for distinguishing between government speech and private speech that will provide the clarity needed in this and various other contexts that the parties and other *amici* have raised throughout the briefing in this case. A clearer standard will benefit all.

Respectfully submitted,

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